FILE COPY

FILED
OCT 23 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,
*Petitioner.*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
*Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

## BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
RALPH N. ALBRIGHT, JR.
888 17th Street, N.W.
Washington, D.C. 20006
Telephone: 202-298-6161
*Attorneys for Amicus Curiae, The American Newspaper Publishers Association*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| INTEREST OF AMICUS CURIAE | 2 |
| ARGUMENT: | |
| A. Application of Section 8(j) of the Ordinance to Newspapers Violates the First Amendment | 8 |
| (1) The Ordinance | 8 |
| (2) The Administrative and Judicial Interpretations of the Ordinance are to the Effect that it Controls the Exercise of a Newspaper's Editorial Judgment in Classifying Advertising | 10 |
| (3) Arrangement of a Newspaper Format Represents Fundamental and Protected Editorial Judgment | 13 |
| (4) The First Amendment Protects Newspapers from the Type of Governmental Intrusion Attempted in this Case | 16 |
| B. Application of the Ordinance as Interpreted Violates the Due Process Clause of the Fourteenth Amendment | 25 |
| C. CONCLUSION | 30 |


## TABLE OF CASES

CASES:


| | |
|---|---|
| *Adolph Coors Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 62 (D. Colo., Jan. 30, 1971) | 26 |
| *Amalgamated Furniture Factories, Inc.* v. *Rochester Times-Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927) | 24 |
| *A.N.P.A.* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968) | 8 |
| *Bowaters Southern Paper Co.* v. *E.E.O.C.*, 304 F.Supp. 33 (E.D. Tenn. 1969), *rev'd*, 428 F.2d 799 (6th Cir. 1970) | 26 |

Page

*Boyd* v. *United States*, 116 U.S. 616 (1885) ..... 16
*Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Calif. 1970), aff'd — F.2d — (9th Cir. 1972) ..... 8
*Cammarano* v. *United States*, 358 U.S. 498, 514 (1958) 13
*Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) ..... 22
*Chicago Joint Board* v. *Chicago Tribune Co.*, 307 F. Supp. 422 (N.D. Ill. 1969) ..... 19
*Citizens Pub. Co.* v. *United States*, 394 U.S. 131 (1969) 14
*Cole* v. *Arkansas*, 333 U.S. 196 (1948) ..... 28
*Goldsmith* v. *Jewish Press Pub. Co.*, 118 Misc. 789, 195 N.Y.S. 37 (1922) ..... 23
*Graniteville Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 155 (4th Cir. Feb. 27, 1971) ..... 26
*Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936) .....14, 17
*Hague* v. *C.I.O.*, 307 U.S. 496 (1939) ..... 22
*Kunz* v. *New York*, 340 U.S. 290 (1951) ..... 22
*Near* v. *Minnesota*, 283 U.S. 697 (1931) ..... 22
*New York Times* v. *Sullivan*, 376 U.S. 254, 269 (1964) 16, 20
*New York Times Co.* v. *United States*, 403 U.S. 713, 29 L.ed. 2d 822 (1971) ..... 22
*Nicholson* v. *Nicholson*, 67 Mont. 517, 216 P. 328, 31 A.L.R. 548 (1923) ..... 29
*Niemotko* v. *Maryland*, 340 U.S. 268 (1951) ..... 22
*Parnessa Realties, Inc.* v. *State Div. of Human Rights*, 317 N.Y.S. 2d 587 (1970) ..... 26
*Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations*, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972) ..... 12
*Rosenbloom* v. *Metromedia*, 403 U.S. 29, 50 (1971) .. 20
*Saia* v. *New York*, 334 U.S. 558 (1948) ..... 22
*Schneider* v. *New Jersey*, 308 U.S. 147 (1939) ..... 22
*Simms* v. *Andrews*, 118 F.2d 803 (10th Cir. 1941) .. 28
*Smith* v. *California*, 361 U.S. 147, 160 (1959) ..... 16
*State* v. *Derosia*, 94 N.H. 228, 50 A.2d 231 ..... 27
*United Interchange, Inc. of Mass.* v. *Harding*, 154 Me. 128, 145 A.2d 94 (1950) .....20, 21, 22, 25
*United States* v. *Hunter*, 324 F.Supp. 529 (D.Md. 1971), *aff'd*, 459 F.2d 205 (4th Cir. 1972) .....5, 6
*United States* v. *Zerbst*, 111 F.Supp. 807 (E.D.S.C., 1953) ..... 27
*Valentine* v. *Christenson*, 316 U.S. 52 (1942) ..... 12

## TABLE OF STATUTES, ORDINANCES, AND REGULATIONS

Page

*Act Against Discrimination*, Kan. Stat. Ann. §§ 44-1009(c), (e), (1972) ..... 4

*Anti-Discrimination Act of 1965*, Utah Code Ann. §§34-5-b(d), (e) (1953 Rep. Vol. 4, 1971 Supp.) ..... 4

*Civil Rights Act*, Ariz, Rev. Stat, Ann. §§ 41-1463(3), (5) (1972 Supp.) ..... 3

*Civil Rights Act*, Iowa Code Ann. §§ 601A.7.1.C, 601.8.1 (1973 Supp.) ..... 4

*Fair Employment Practices Act*, Cal. Labor Code Ann. §§ 1420(d), (f) (West 1971) ..... 3

*Fair Employment Practice Act*, Conn. Gen. Stat. §§ 31-126(e), (f) (1961 Rev., 1969 Supp.) ..... 4

*Fair Employment Practice Law*, Hawaii Rev. Stat. §§ 378-2(3), (6) (1968) ..... 4

*Fair Employment Practice Act*, Mass. Ann. Laws, Ch. 151B, §§ 4(3), (5) ..... 4

*Fair Employment Practice Act*, Mich. Stat. Ann. §§17. 4581 (3a)(d)(1), 17.4581(3)(g) (1968) ..... 4

*Fair Employment Practices Act*, Mo. Rev. Stat. §§ 296. 020(3)(5) (1969) ..... 4

*Fair Employment Practice Act*, Ore. Rev. Stat. §§ 659. 030(3), (5) (1971) ..... 4

*Fair Employment Practices Act*, R.I. Gen. Laws §§ 28-5-7(D)(4), (F) (1956, 1972 Supp.) ..... 4

Federal Election Campaign Act of 1971, Section 103 (b), P.L. 92-225 92nd Cong. 2d Sess., 88 Stat. 3. .. 6

Federal Campaign Act of 1971, Section 104(b), P.L. 92-225 92nd Cong. 2d Sess., 88 Stat. 3. ..... 6

Federal Election Campaign Act of 1971, Section 106, P.L. 92-225 92nd Cong., 2d Sess., 88 Stat. 3. .... 7

*Human Relations Act*, Pa. Stat. Ann. Tit. 28, §§ 955 (b)(2), (e) (1964, 1972 Cum. Supp.) ..... 4

*Human Rights Act*, N.M. Stat. Ann. §§ 4-33-7-D, I(1) (1953, 1971 Supp.) ..... 4

*Human Rights Law*, N.Y. §§ 296-1(d), 6 (McKinney, 1972) ..... 4

*Human Rights Law*, N.Y. City Admin. Code §§ B1-7.0 (1)(d), 7.0.(6) (1971) ..... 4

*Law Against Discrimination*, N.H. Rev. Stat. Ann. §§ 354-A:8 (III, VI), (1955, 1972 Supp.) ..... 4

Page

*Law Against Discrimination*, N.J. Stat. Ann. Tit. 10, Ch.5. §§ 12(c)(e) (1972 Supp.) ..... 4
*Law Against Discrimination*, Wash. Rev. Code § 49.60. 180(4), § 49.60.220 (1972 Supp.) ..... 4
*Pittsburgh Human Relations Ordinance* No. 75, as amended by Ordinance No. 395 ..... 8
*Pittsburgh Human Relations Ordinance* No. 75, § 8 (e) ..... *passim*
*Pittsburgh Human Relations Ordinance* No. 75, § 8 (j) ..... *passim*
*Pittsburgh Human Relations Ordinance* No. 75, § 13 10
*Pittsburgh Human Relations Ordinance* No. 75, § 13(a) 10
*Pittsburgh Human Relations Ordinance* No. 75, § 13(g) 10
*Pittsburgh Human Relations Ordinance* No. 75, § 13(h) 10
*Pittsburgh Human Relations Ordinance* No. 75, § 13(i) 10
*Pittsburgh Human Relations Ordinance* No. 75, § 15 10
Rule 2(c)(4), *Pittsburgh Human Relations Commission Regulations* ..... 26
Rules and Regulations of the Comptroller General, Sections 3.1 et seq and 4.11 et seq., 37 F.R. 6156, 6157, 6159 (March 24, 1972) ..... 7
*State Act Against Discrimination*, Minn. Stat. §§ 363.03 (1)(4)(b), (1)(6)(2) (1971)..... 4
37 F.R. 6159, Section 4.11 (March 24, 1972) ..... 7
37 F.R. 6159, Section 4.12(d) (March 24, 1972) ..... 7
37 F.R. 6700 (April 1, 1972) ..... 5
42 U.S.C., § 3604(c) ..... 5

## TABLE OF OTHER REFERENCES

Labor Relations Reporter (FEP) 451:407 (1972) .... 4
Labor Relations Reporter (FEP) 451:570K (1972) .. 4
Labor Relations Reporter (FEP) 451:650 (1972) .... 4
Note, *Regulation of Advertising*, 56 Colum. L. Rev. 1018 (1956) ..... 23
M. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971) .... 13
Publication Guidelines for Compliance with Title VII of the Civil Rights Act of 1968, Section A(1), 37 F.R. 6700, 6701. ..... 5
21 Am. Jur. 2d, *Criminal Law* § 119 (1965) ..... 27
41 Am. Jur. *Pleadings* § 310 (1961) ..... 29

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-419

---

PITTSBURGH PRESS COMPANY,

*Petitioner.*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

*Respondents.*

---

**On Writ of Certiorari to the Commonwealth Court of Pennsylvania**

---

## BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

---

### PRELIMINARY STATEMENT

The American Newspaper Publishers Association s this brief as amicus curiae, urging that the Janu- 27, 1972, Order and Decision of the Commonwealth rt of Pennsylvania be reversed. It is this Order

and Decision which are reviewable here because the Supreme Court of Pennsylvania on June 21, 1972, refused to grant The Pittsburgh Press' Petition for Allowance of Appeal in this action.

## INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a non-profit, membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,000 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, The Pittsburgh Post-Gazette, and seventy-four other newspapers located throughout Pennsylvania, hold membership in the ANPA.

Many of the Association's members utilize a classification system in their help-wanted advertising sections almost identical to that utilized by The Pittsburgh Press and questioned in this action. The vast majority of the Association's member newspapers have found through years of experience that the system of help-wanted advertising classification that best serves the interests of a significant majority of the job-seeking public is one which provides advertisers with three column headings (male-female-neuter) to indicate that the employment advertised may be of more interest to males or females or of equal interest to either.

Because this help-wanted classification system serves the interests of a significant majority of a newspaper's readers and advertisers; because this manner of advertising display and the judgment exercised in classifying employment advertising under such columns represents more than mere commercial activity and

nvolves essential editorial prerogatives; and because he First and Fourteenth Amendments protect the xercise of this judgment, the Association believes that hose of its members which desire to preserve and re- ain such classifications are entitled to do so. For these easons, and in order to communicate its members' nterests in this subject, the Association participated s amicus curiae in the proceedings below.

This appeal presents important national issues as to he extent to which the First Amendment protects ublishers from unwarranted intrusions on the exer- ise of their editorial prerogatives in arranging their ewspapers; and from unreasonable burdens imposed n them by forcing newspapers to arrange their con- ents to conform to the social whims of administrative gencies charged with the enforcement of certain social egislation. Your amicus has noted with mounting con- ern the proliferation of social remedial legislation on oth the State and Federal level which seeks to or oes impose on newspapers the ultimate burden, re- ponsibility and liability for enforcement of the aims f the legislation. The local ordinance questioned in his appeal is representative of the type of legislation hich forces newspapers to publish certain otherwise nocuous advertising at their peril. Indeed, the Pitts- urgh Ordinance is but one of twenty (20) almost iden- cal statutes and ordinances which have been, or based pon the decisions below, could be interpreted to regu- te the editorial conduct of newspapers in arranging eir newspaper format.[1]

---

[1] ARIZ. *Civil Rights Act*, Ariz. Rev. Stat. Ann. §§ 41-1463(3), 5) (1972 Supp.); CAL. *Fair Employment Practices Act*, Cal. abor Code Ann. §§ 1420(d),(f) (West 1971). (The California ttorney General has held that newspapers do not aid or abet an nlawful employment practice by maintaining gender-designated

This governmental intrusion is not limited to the field of employment advertising. At the federal level and as interpreted by the courts, the Congress has

classified employment advertising headings. Attorney General Opinion No. 71/46); CONN. *Fair Employment Practice Act*, Conn. Gen. Stat. §§ 31-126(e),(f) (1961 Rev., 1969 Supp.); HAWAII *Fair Employment Practice Law*, Hawaii Rev. Stat. §§ 378-2(3), (6) (1968); IOWA. *Civil Rights Act*, Iowa Code Ann. §§ 601A.7.1.C, 601.8.1 (1973 Supp.). (The Iowa State Civil Rights Commission has notified forty-one Iowa newspapers to cease to use gender-designated column headings in their classified employment advertising sections. Lab. Rel. Rep. (FEP) 451:407 (1972)); KANSAS *Act Against Discrimination*, Kan. Stat. Ann. §§ 44-1009(e),(e) (1972); MASS. *Fair Employment Practice Act*, Mass. Ann. Laws Ch.151B, §§ 4(3), (5) (The Massachusetts Commission Against Discrimination adopted guidelines and regulations on January 21, 1971 which provide that the use of gender-designated headings is unlawful unless a notice similar to the one used by the Pittsburgh Press is prominently displayed on every classified advertising page. Lab. Rel. Rep. (FEP) 451:570K (1972)); MICH. *Fair Employment Practice Act*, Mich. Stat. Ann. §§ 17.4581 (3a) (d)(1), 17.4581(3)(g) (1968); MINN. *State Act Against Discrimination*, Minn. Stat. §§ 363.03(1)(4)(b),(1)(6)(2) (1971). (The Minnesota Department of Human Rights guidelines provide that the maintenance by newspapers of sexually separated help-wanted advertising is an unfair discriminatory practice Lab. Rel. Rep. (FEP) 451:650 (1972)); Mo. *Fair Employment Practices Act*, Mo. Rev. Stat. §§ 296.020(3),(5) (1969); N.H. *Law Against Discrimination*, N.H. Rev. Stat. Ann. §§ 354-A:8 (III, VI), (1955, 1972 Supp.); N.J. *Law Against Discrimination*, N.J. Stat. Ann. Tit. 10, Ch. 5. §§ 12(c), (e) (1972 Supp.); N.M. *Human Rights Act*, N.M. Stat. Ann. §§ 4-33-7-D, I(1) (1953, 1971 Supp.); N.Y. *Human Rights Law*, N.Y. Human Rights Law §§ 296-1(d), 6 (McKinney, 1972); ORE. *Fair Employment Practice Act*, Ore. Rev. Stat. §§ 659.030(3),(5)(1971); Pa. *Human Relations Act*, Pa. Stat. Ann. Tit. 28, §§ 955(b)(2),(e) (1964, 1972 Cum. Supp.); R.I. *Fair Employment Practices Act*, R.I. Gen. Laws §§ 28-5-7(D)(4), (F) (1956, 1972 Supp.); UTAH *Anti-Discrimination Act of 1965*, Utah Code Ann. §§ 34-5-b(d),(e) (1953 Rep. Vol. 4, 1971 Supp.); WASH. *Law Against Discrimination*, Wash. Rev. Code § 49.60.180 (4), § 49.60.220 (1972 Supp.); N.Y. CITY *Human Rights Law*, N.Y. City Admin. Code §§ B1-7.0(1)(d), 7.0(6) (1971).

sought to impose on newspapers the duty of screening real estate advertisements for their discriminatory impact under the provisions of the Civil Rights Act of 1968.[2] *See United States* v. *Hunter*, 324 F. Supp. 529 (D. Md. 1971), *aff'd*, 459 F.2d 205 (4th Cir. 1972), now pending in this Court as No. 72-146. In justifying this interpretation of the Civil Rights Act of 1968, the Fourth Circuit found that from the body of an advertisement, a newspaper could somehow "divine"[3] an advertiser's intent to discriminate in the field of real estate transaction. To ostensibly assist newspapers in divining an advertiser's discriminatory intent, the Department of Housing and Urban Development published certain interpretive "guidelines."[4] But, rather than curing the ambiguous standards to be applied by newspapers in divining discriminatory intent, these "guidelines" only serve to illustrate the monumental burdens thrust upon newspapers in making them the enforcement arms of the Civil Rights Division of the Justice Department.

These HUD "guidelines" create more problems for newspapers than they purport to solve. For example, words descriptive of dwellings,[5] catchwords,[6] symbols,[7] colloquialisms,[8] and even directions to the property[9]

---

[2] 42 U.S.C. § 3604(c).

[3] *United States* v. *Hunter*, 459 F.2d at 213.

[4] 37 F.R. 6700 (April 1, 1972).

[5] Section A(1), Publication Guidelines for Compliance with Title VIII of the Civil Rights Act of 1968, 37 F.R. 6700, 6701.

[6] *Ibid.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

or descriptions of the location,[10] can be found on an after-the-fact basis to tend to indicate an intention to discriminate in the sales or rental of real estate. Yet, unless *Hunter* is reversed by this Court, newspapers must make such instantaneous judgments on possibly thousands of daily real estate advertisements at the peril of injunctive or other sanctions.

In connection with the advertising proscriptions of the Civil Rights Act of 1968, these screening burdens have been imposed on newspapers merely because it is easier for the Justice Department to proceed against a newspaper than against an advertiser. In fact, the Justice Department candidly admitted in *Hunter* that enforcement against each advertiser would be impractical. Therefore, the Department stated: "The logical option would be to build a dam at some strategic spot in the flow of publication, such as the newspaper office."[11] But certainly governmental convenience can never justify such drastic action.

Still another example of similar governmental intrusion is the Federal Election Campaign Act of 1971. In addition to regulating rates newspapers may charge for political advertising,[12] another section of that Act provides that no person may place a covered political advertisement in a newspaper without first certifying in writing to the newspaper that the spending limitations of the Act have been followed.[13] Without such a

---

[10] *Id.*

[11] United States' Pre-Trial Memorandum, p. 12 filed 1/28/71, *United States* v. *Hunter*, Civil Action No. 70-816T, D. Md.

[12] Section 103(b), Federal Election Campaign Act of 1971, P.L. 92-225 92nd Cong. 2d Sess., 88 Stat. 3.

[13] Section 104(b), Federal Campaign Act of 1971, P.L. 92-225 92d Cong., 2d Sess., 88 Stat. 3.

rtification or written statement, a charge for the ivertising may be unenforceable and unlawful.[14] Un- r the regulations promulgated by the Comptroller eneral pursuant to the Act, a newspaper must pre- rve for two years such certificates together with an appropriate" notation showing use actually made by ch candidate, the dates used, and the charges made for ch advertising.[15] Furthermore, an even more vicious ovision of this Act requires newspapers at their peril make subjective decisions as to whether a political ivertisement is by or on behalf of any legally quali- d candidate for federal elective office (or for nomi- tion to such office).[16] If a newspaper wrongly de- des an advertiser's coverage, it can be subjected to iminal penalties.[17]

These statutes illustrate a dangerous proposition hich unfortunately has gained wide legislative accept- nce. By choosing newspapers as the most convenient ehicle for enforcement of what may otherwise be laud- tory remedial social legislation, Congress and various tate legislatures have overstepped the bounds of the irst and Fourteenth Amendments. Because of the vi- al Free Press and Due Process issues surrounding overnmental regulation of the editorial judgment ex- rcised by the press in classifying and publishing ad-

---

[14] See Sections 3.1 et seq. and 4.11 et seq., Rules and Regula- ons of the Comptroller General, 37 F.R. 6156, 6157, 6159 (March 4, 1972).

[15] Section 4.12(d), 37 F.R. 6159 (March 24, 1972).

[16] Section 4.11, 37 F.R. 6159 (March 24, 1972).

[17] Section 106, Federal Election Campaign Act of 1971, P.L. 2-225 92d Cong., 2d Sess., 88 Stat. 3.

vertising, this case is one of substantial national importance and major significance to all the press of this country.

To the knowledge of your amicus, this is the first action in which litigation has confronted the courts with the question of the legality of sex classification in the help-wanted advertising sections of newspapers.[18] For this reason, your amicus desires to present to this Court for its assistance, the views of the vast majority of its members in regard to the Constitutional validity of applying Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers.

## ARGUMENT

### A. APPLICATION OF SECTION 8(j) OF THE ORDINANCE TO NEWSPAPERS VIOLATES THE FIRST AMENDMENT.

#### I. The Ordinance

The Human Relations Ordinance No. 75 of the City of Pittsburgh, as amended by Ordinance No. 395, condemns as an unlawful employment practice the publi-

---

[18] Two Federal cases have touched peripherally on this question. Neither has reached the merits of the issue involved in this appeal. *A.N.P.A.* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968) concentrated on both the statutory authority of the Equal Employment Opportunity Commission to promulgate "guidelines" purporting to be substantive regulations and the legal effect of such "guidelines." The former issue remains unresolved by that litigation. But, in connection with the latter issue, the Court held that such "guidelines" do not have the force and effect of law. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Calif. 1970), aff'd — F.2d — (9th Cir. 1972), involved the novel question of whether a newspaper, by publishing help-wanted advertising, was an "employment agency" within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). The Court in *Brush* had no difficulty in concluding that such activity did not make newspapers "employment agencies" either within the meaning of the Act or within the commonly understood meaning of the term.

cation of any advertisement which "indicates any discrimination because of . . . sex" [19] by a covered employer, employment agency, or labor organization. Section 8(j) of that Ordinance prohibits "any person" from aiding, inciting, compelling, coercing or participating in such an unlawful employment practice.[20]

For a violation of any provision of the ordinance or order of the Pittsburgh Commission on Human Relations, the local administrative body charged with the enforcement of the ordinance, "any person" shall be subject to a fine of not more than Three-Hundred

---

[19] Section 8(e) of Ordinance No. 75 was enacted into law by the Council of the City of Pittsburgh on February 27, 1967 and provides:

> "It shall be an unlawful employment practice . . . for any 'employer', employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' . . . which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth."

Section 8(e) of Ordinance No. 75 was amended by sections 3 of Ordinance No. 395 which was enacted into law by the City Council on July 7, 1969 and which provides: "It shall be an unlawful employment practice . . . for any person to discriminate against any other person in the manner set forth in Sections 8 . . . of this Ordinance because of sex."

[20] Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395, provides: "It shall be an unlawful employment practice . . . for any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

Dollars ($300.00), and in default thereof, to imprisonment of not more than ninety days.[21]

A person allegedly aggrieved by an unlawful employment practice may file a complaint with the Commission,[22] and if, after a public hearing [23] at which testimony and other evidence are taken,[24] the Commission determines that an unlawful employment practice has occurred, it "shall issue such order in writing as the facts warrant to effectuate the purposes of this ordinance." [25]

**2. The Administrative and Judicial Interpretations of the Ordinance Are to the Effect that It Controls the Exercise of a Newspaper's Editorial Judgment in Classifying Advertising**

Pursuant to this Ordinance and complaining that the maintenance of column headings designated "Jobs—Female Interest," "Jobs—Male Interest," and "Jobs—Male-Female" was a violation of the aiding and abetting prohibition of section 8(j) of the Ordinance, the National Organization for Women filed its charges against the Pittsburgh Press with the Pitts-

---

[21] Section 15 of Ordinance No. 75, as amended by Ordinance No. 395, provides: "any person who shall violate any provision of this ordinance relating to unlawful practices, or any rule or regulation pertaining thereto adopted by the Commission or any order of the Commission, shall be subject to a fine of not more than Three-Hundred Dollars ($300.00) and in default of payment of the fine and costs, shall be subject to imprisonment for a period not exceeding ninety (90) days."

[22] Section 13(a) of Ordinance No. 75, as amended.

[23] Section 13(g) of Ordinance No. 75, as amended.

[24] Section 13(h) of Ordinance No. 75, as amended.

[25] Section 13(i) of Ordinance No. 75, as amended.

burgh Human Relations Commission on October 9, 1969 alleging:

> "The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of section 8(j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of The Pittsburgh Press that their policy of allowing employers to place advertisements in male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

Finding that there was probable cause to believe that a discriminatory act occurred, the Commission ordered a public hearing which was conducted on January 15, 16, and February 12 and 26, 1970. Without any specific evidence that a covered entity violated the Ordinance by placing a help-wanted advertisement under a gender-designated column heading or that such a covered employer refused to hire an applicant solely on the basis of sex, the Commission ordered The Pittsburgh Press to cease and desist from the utilization of a help-wanted advertising classification system. In short, the Commission ordered the newspaper to change its format and arrangement of classified employment advertising. This Commission injunction was upheld on appeal by the Court of Common Pleas of Allegheny County, Pennsylvania,[26] and by the Commonwealth Court of Pennsylvania.[27] In sustaining the decision of the Commission in the lower Court requiring the Press

---

[26] See Appendix, Petition of the Pittsburgh Press Co. for a Writ of Certiorari, p. 19a.

[27] 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

to eliminate its classification system, the Commonwealth Court suggested:

> "What is of importance is that through the use of its arbitrarily selected column headings The Pittsburgh Press 'aids' such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. Perhaps more importantly, asexual employment advertising column headings will aid in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities.[28]

From this administrative and judicial action, it should be clear that the conduct which has been questioned in this action involves newspaper activity that is subject to First Amendment protection. The system of gender classification of help-wanted advertising represents the exercise of editorial discretion, judgment, and prerogatives. Nevertheless, the Commission and the courts below justified this gross intrusion on the First Amendment rights by characterizing the activity sought to be regulated as "purely commercial" in nature and dogmatically followed the teaching of the totally unrelated case of *Valentine* v. *Christenson*, 316 U.S. 52 (1942). Were this problem viewed strictly

---

[28] *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations*, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

from the standpoint of an employer-advertiser, an employment advertisement might be properly characterized as representing "pure" commercial advertising and not entitled to First Amendment protection.[29] But this problem must be examined instead with the daily newspaper as a frame of reference.

Clearly, this characterization is superficial and incorrect for the doctrine, if it be that, of *Valentine* is inapplicable here because the decisions and activities of a publisher in arranging his newspaper format represent the exercise of fundamental and protected editorial discretion.

### 3. Arrangement of a Newspaper Format Represents Fundamental and Protected Editorial Judgment

This case raises questions relating to fundamental principles involved in newspaper publishing. When the First Amendment to the Constitution was adopted, it was known that in the existing context of newspaper publishing under the system of government being adopted by the people of our nation that the process enabling the distribution of information was a commercial process.

---

[29] Some commentators have suggested that this doctrine, first enunciated in *Valentine*, which excises commercial advertising from any First Amendment protection has lost vitality. "The ruling was casual, almost offhand, and it has not survived reflection." *Commarano* v. *United States*, 358 U.S. 498, 514 (1958) (Douglas, J. concurring) Viewed from the standpoint of the recipient, informational rather than persuasional advertising conveys information to the consuming public as important as the information conveyed by political or editorial advertising. Hence, the value of the commercial-non-commercial dichotomy in determining the extent of First Amendment rights to be enjoyed by advertising may be mythical. *See, e.g., M. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971).*

A newspaper is sold for a price to the public. In addition, its advertising is sold for a price to a segment of the public. Both transactions are commercial transactions in that sense. This in no way negates the primary consideration of the First Amendment in protecting the dissemination of information in the form of news, editorials, features, obituaries, marriage announcements, comic strips, television programs, classified ads, display ads, and the like under editorial prerogative within the format of the newspaper as a whole. The commercial side merely creates the economic structure supportive of this dissemination. Thus, under our system in this country, the First Amendment protection applies to the distribution of the protected information without regard to whether it is advertising information or otherwise. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Citizens Pub. Co.* v. *United States*, 394 U.S. 131 (1969).

The sweeping order of the Commission requiring elimination of the sexual classifications was justified by both the Commission and the court below by characterizing help-wanted advertising as a form of purely commercial advertising not entitled to First Amendment protection. But the lower courts in reaching this characterization viewed the problem involved herein from the wrong frame of reference. While this asserted distinction between commercial and non-commercial advertising may appear at first glance to have some basis in law vis-a-vis regulation of the advertiser, the efforts of the tribunals below to rest their action on this dichotomy overlook a fundamental point. The administrative action did not concentrate on the content of any employment advertisement. In fact, not one specific advertisement was discussed at either hearing. Instead, the Commission action sought to

condemn the newspaper's manner of advertising display. Throughout the administrative and court hearings below, the complainant and the City made it clear that they scored the Press' system of employment advertising. It was the euphemistic system on trial and not the proper application of the Ordinance to the "facts" adduced at the Commission hearing. With the hearings cast in this posture, it was no surprise that such fundamental points were overlooked.

In seeking to condemn the newspaper's manner of advertising display, the hearings invaded the area of editorial policy and judgment. Although few, if any, court decisions have sought to reach or even trace the outer limits of such judgment, it must be recognized that a newspaper's decision as to how advertising shall be displayed is as much an editorial function as its decision as to how its editorial page shall be constructed or what its editorial position shall be on a particular issue of the moment.

We recognize that to those outside the newspaper business, decisions surrounding advertising display may not appear as important as those surrounding other editorial functions. But even one outside the field of journalism would admit that whatever difference exists between the two is only a matter of degree. Both are editorial in nature; and infringement of what some may consider the lesser only provides a basis or precedent for a later infringement of the other. The police power is the power source of the Pittsburgh Ordinance, which has been interpreted below to forbid the newspaper from deciding its format. However, the City could not impose restraints on the type-size, the front or interior page layout of articles, the design or characteristics of the masthead or the use of color photographs. The reason that the City cannot

control such activities is that they are clearly editorial in nature and are protected by the First Amendment.

This point should not be considered an argument *ad terrorem*, for rights are eroded by slow, almost imperceptible steps, each one providing a precedent for the next. Quite apart from seeking to correct the underlying erroneous interpretation given to Section 8(j) by both bodies below, the press must be vigilant in preventing even the smallest step from being taken which would undermine a newspaper's right to make such editorial policy and related judgments.

#### 4. The First Amendment Protects Newspapers from the Type of Governmental Intrusion Attempted in This Case

While the general aims of social legislation to eliminate the last vestiges of unjustified discriminatory employment practices are to be applauded, still such legislation as the Ordinance under question can claim no "talismanic immunity" from the limitations of the First Amendment. *New York Times* v. *Sullivan*, 376 U.S. 254, 269 (1964). The examination of the application and the effect of application of section 8(j) of the Pittsburgh Ordinance to newspaper publishers must be made with the recognition that this particular kind of governmental intrusion on the press may be considered by many to be " 'the obnoxious thing in its mildest and least repulsive form . . .' but 'illegitimate and unconstitutional practices get their first footing in that way. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." *Smith* v. *California*, 361 U.S. 147, 160 (1959) (Black, J. concurring), *citing Boyd* v. *United States*, 116 U.S. 616 (1885). The application of section 8(j) to news-

papers in publishing advertisements goes too far. Abridging a publisher's free exercise of judgment in his newspaper layout offends the free press clause of the First Amendment.

The publisher in this case is under an order of the Pittsburgh Human Relations Commission to classify help-wanted advertising without regard to whether a publisher may consider classification based on jobs of interest to males and females serves the best interests of the newspaper, its readers, and its advertisers. Thus, the publisher has been ordered by the Commission to rearrange his newspaper and classify advertising asexually on the pain of an *in futuro* determination that for whatever reason he erred on a particular advertisement. Moreover, the order questioned in this proceeding was entered on the basis that the mere act by the publisher of maintaining innocuous gender-designated column headings and classifying employment advertisements thereunder offended the Ordinance without regard to whether the publisher had any actual knowledge that a particular employer-advertiser was covered by the Ordinance or that such an advertiser intended to and did unjustifiably discriminate against applicants for a covered, advertised job on the basis of sex.

Such an order and such an interpretation of the Ordinance is in derogation of the First Amendment which exists so that a free and untrammeled press may live. As this Court noted in *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have

> shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

If, as here, the press can be regulated and penalized for the reasonable exercise of its editorial judgment in regard to layout format for advertising, there is no reason why it could not also be subjected to government regulation of other aspects of its editorial functions. No one would seriously contend that front-page design and layout or type-size or different labeling of news articles as fact or editorial or women's and men's sections or such similar things are the proper subjects for regulation. But that is not the point. Unless this Court reverses the decision herein, such functions of the press could be regulated if tomorrow some ingenious legislator couples the regulation with some otherwise laudable social goal. There is scant, if any, middle ground between what some may consider to be minor meddling involved in this case and full abridgment of the right. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a

ewspaper." 2 Chafee, *Government and Mass Communication* 633 (1947).[30] Yet if this Pittsburgh Ordinance as interpreted stands in the face of this constitutional challenge, the city will have made the first step controlling the content of the press. For these asons, the ordinance must be declared unconstitunal under the First Amendment.

There is still another reason, however, why this ordince must fall. Not only does this ordinance abridge itorial prerogatives, but it goes beyond that and rces newspapers to screen and publish employment vertisements at their peril. This onus was justified the decisions below by characterizing the classifican of employment advertising as purely commercial nature. As stated hereinabove, this characterization mproper for the reason that the classification system indeed editorial rather than commercial in nature. wever, even if one were to accept the premise that he very least the classification process is a hybrid—t editorial and part commercial—it still follows t by forcing newspapers to screen advertising at r peril and in that screening process to make intaneous judgments on the discriminating impact housands of employment ads daily, the Ordinance nterpreted places an unconstitutional burden on the s.

---

[30] *See also, Chicago Joint Board* v. *Chicago Tribune Co.* 307 pp. 422 (N.D. Ill. 1969), *aff d.*, 435 F.2d 470 (7th Cir. 1970), *denied*, 402 U.S. 973 (1971) where the District Court correcognized that: "[T]he function of the press from the the Constitution was written to the present time has never onceived as anything but a private enterprise, *free and indent of government control and supervision.* Rather than state and participation pervading the operation of the press, *the nedia and the government have had a history of disassocia-* (Emphasis added). 307 F.Supp. at 427.

Indeed, it was a similar burden placed on newspapers which justified the rationale of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *New York Times* was amplified and extended in *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 50 (1971) where the Court stated:

> "In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—*but the possibility of such error*, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate."

We do not suggest that after-the-fact controversies surrounding the discriminatory impact of employment advertising would expose a publisher to the extent of the exposure in *Metromedia*. The point involved, however, is not the extent of exposure but rather the exposure itself. On the pain of expending significant sums in defending a Commission action brought over the Ordinance as interpreted and on the further pain of being subjected to the existence of the contested order of the Commission, The Pittsburgh Press involuntarily is sought to be made a subagency of the Pittsburgh Human Relations Commission. We strongly urge that this cannot be countenanced by the First Amendment.

Moreover, the city treads in a delicate area in this case, for if it may, as its ordinance has been interpreted, through prior injunction, prevent the flow of information through advertisements, it may also prevent the flow of information through defendant's news stories or editorial policy. For example, in *United In-*

*terchange, Inc. of Mass.* v. *Harding*, 154 Me. 128, 145 A.2d 94 (1950), the petitioner published a magazine which specialized in advertising business and income-producing properties. The magazine also contained editorial comment and news items dealing with the real estate business generally. The State of Maine sought to bring the magazine within its law regulating real estate brokers and agents.[31] Thus being subject to the licensing requirements of the statute, the state sought to prevent further circulation of the magazine until its publishers became licensed real estate brokers. The court held the statute under which the state proceeded to be unconstitutional and noted that:

> "Since the advertising activities of the daily newspaper . . . differ from those of petitioners only in the fact that advertising accepted by the latter is restricted to the field of income producing real estate, the decision in the instant case is of vital concern to the whole press. The protection of the freedom of the press is intended primarily to safeguard the public in its right to the circulation of information . . . The evidence discloses that petitioners support by advertising sales, publish and circulate a magazine which contains information, opinion and advertising. We are not here concerned with any abuse of liberty. No one would seriously contend that the publication of advertisements for the sale of real estate is a proper subject for any 'previous restraint.' The press can be deprived of its liberty as quickly by previous rigid censorship. If by an artificial licensing device, the business of these petitioners can be curtailed or terminated, we see no obstacle to further

---

[31] That statute defined those who were covered to include: "[A]ny person, firm, . . . [who] undertakes to promote the sale of real estate through the listing of such property in a publication . . ." 145 A.2d at 96.

encroachment on freedom of the press by restrictive legislative device aimed at specific media or even at the whole industry . . . We cannot sanction any breach in the wall of protection." [82] Id. at 99

As in *United Interchange*, the city here seeks to utilize Section 804(c) to define the business of accepting and publishing advertisements as something which it is not. A newspaper, by publishing employment advertising in no way participates in the employment business. If, however, the Ordinance were construed to cover newspapers, such construction could only be grounded on such erroneous theory. To do so, it is submitted, negates the freedom of the press and is invalid under the First Amendment.

In that regard, it is helpful to examine how the New York courts treated newspapers under the New York

---

[82] Cases are legion which deny to Government the power to curtail by prior injunction or restrain the free flow of information or opinion. See, e.g., *New York Times Co.* v. *United States*, 403 U.S. 713, 29 L.ed. 2d 822 (1971) (publication of classified government documents); *Near* v. *Minnesota*, 283 U.S. 697 (1931) (injunction against alleged defamatory newspaper invalid); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939) (ordinance requiring discretionary permit for canvassing invalid); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (ordinance requiring discretionary permit for religious or charitable solicitation invalid); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939) (Ordinance requiring discretionary permit for public meeting invalid); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (prosecution for public meeting without discretionary permit invalid); *Saia* v. *New York*, 334 U.S. 558 (1948) (ordinance requiring discretionary permit for sound track invalid); *Kunz* v. *New York*, 340 U.S. 290 (1951) (prosecution for meeting without discretionary permit invalid). It is submitted that these cases are persuasive on the problem herein presented. It should be clear that whether a particular advertisement is discriminatory or indicates a preference is a matter of discretion and the resolution of the question depends largely on the viewer's (in this Case, the Government) outlook.

false advertising law.[33] In *Goldsmith* v. *Jewish Press Pub., Co.*, 118 Misc. 789, 195 N.Y.S. 37 (1922), the New York court was confronted by an injunction action instituted by the plaintiff who was a public accountant. The plaintiff sought to enjoin the defendant newspaper from publishing any advertisement containing the words "certified public accountant" or the initials "C.P.A." where the advertiser was not, in fact, a certified public accountant. The thrust of plaintiff's suit was that one holding himself out as a C.P.A. in an advertisement without possessing the certificate of a certified public accountant published a false advertisement which contravened the New York false advertising statute. In discussing the applicability of the false advertising statute to newspapers, the court correctly observed:

> "It is clear that the penal statute is directed against the advertiser, and *not the publisher of the newspaper*, who ordinarily can have no personal knowledge of the truth of the advertisements he publishes in his newspaper, and, unless he chooses to censor such advertisements himself, he is not required to do so by law." Id. at 37. (Emphasis added.)

In *Goldsmith*, the court's decision rested on the unstated premise that it would be unreasonably burdensome to require the newspaper publisher to sift from

---

[33] Presently, the overwhelming majority of State Printers Ink statutes exempt newspapers from coverage. In the one or two that purportedly cover newspapers in publishing false advertising, coverage is limited only in the event that the newspaper publishes the contested advertisement with actual knowledge of its falsity. *See, generally, Note, Regulation of Advertising*, 56 Colum. L. Rev. 1018 (1956). The New York cases apparently involved a false advertising law which was silent on newspaper coverage.

its advertising pages those advertisements which were false or those which the publisher might conceivably think were false. Obviously such an onus placed on a newspaper would not only be unreasonable but, in the day-to-day operations of the newspaper, oppressive. There is little practical difference between the concept of false advertising and the concept of discriminatory advertisements.

Another New York case demonstrates this point. In *Amalgamated Furniture Factories, Inc.* v. *Rochester Times Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927), the plaintiff was an advertiser in defendant's newspaper. It brought suit against the newspaper because it refused to accept certain of plaintiff's advertisements. As a defense, the newspaper stated that the subject advertisements were false and misleading. In bolstering that defense, certain officers of the newspaper incorrectly testified that they would be subject to the New York false advertising law, apparently as an aider and abettor, if they accepted and published false advertising. The court flatly rejected that argument. Although the court held that the defendant could legally refuse to accept the advertisements, it did so on the basis of fundamental contracts law, and not on the basis of purported coverage by the statute:

> "Irrespective of the rate cards, the defendant was under no contract obligation to publish untrue statements in its advertising columns . . . This is not because, as one of the affiants seems to imply in his adffidavit on behalf of the defendant, that it would be a crime to publish such an advertisement. He quotes without labelling the source . . . a brief phrase that occurs in Section 421 of the penal law, relating to untrue and misleading advertisements. This statute does not brand the

newspaper as the misdemeanant, but rather the advertiser. The former, though, cannot be compelled to cooperate knowingly in the commission of a crime, however formally binding its contract obligations may appear to be. This is elemental in the law of contracts." 219 N.Y.S. at 707.

Like the rejected interpretation of the Maine statute in *United Interchange*, the application of Section 8(j) of the Pittsburgh Ordinance to newspapers would impose upon them requirements which are constitutionally appropriate only for the advertiser. If a newspaper can be held civilly or criminally liable, irrespective of its actual knowledge, for every advertisement which may be held to violate the law, not only will the efficiency of newspaper production be curtailed, but more importantly, its advertising revenue and its ability to disseminate information and ideas will be curtailed.

### B. APPLICATION OF THE ORDINANCE AS INTERPRETED VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Because Section 8(j) forbids persons from aiding or abetting the violation of the Ordinance, it is elementary that the complaint must at the minimum set out the act and the actor which were aided or abetted by respondent. Additionally, it is fundamental that the act alleged to be a violation of the Ordinance must indeed constitute an unlawful employment practice. This, in turn, requires an allegation that the principal allegedly aided by the Press was covered by the Ordinance.

It must be recognized that a violation of this Ordinance carries criminal penalties: Section 15 establishes a Three Hundred Dollar ($300) fine, or a period of

ninety (90) days imprisonment for a violation of either the Ordinance or a Commission rule, regulation or order. Clearly, then, a complaint charging an unlawful employment practice before the Commission must be tested by the standards applied to criminal charges or, at the very least, those applied in civil pleadings.[34]

A brief reading of the "particulars"[35] of the complaint reveals that its thrust is that The Pittsburgh Press did not agree with NOW's interpretation of Section 8(j) of the Ordinance. Certainly, disagreement with NOW's interpretation of Section 8(j) is not an unlawful employment practice within the meaning of any provision of Section 8 of the Ordinance.

---

[34] The complaint filed by NOW fails to meet even the requirements of the Commission's regulations. Rule 2(c) (2) of the Commission's regulations requires that the complaint set forth the names and addresses of persons alleged to have committed the alleged unlawful employment practice. NOW only sets forth the name of the entity who was allegedly the aider or abettor. They did not specify who was aided or abetted. Further, the complainant failed to allege the particulars of the unlawful employment practice which was supposedly aided or abetted by The Pittsburgh Press. Such an allegation is a bare, minimum requirement of Rule 2(c) (4) of the said regulations, which provides that the complaint shall contain "the alleged unlawful discriminatory practice and a statement of the particulars thereof."

[35] Required by Commission Rule 2(c) (4). For Federal cases construing the admittedly liberal administrative pleading requirements of the non-criminal Civil Rights Act of 1964, see *Bowaters Southern Paper* v. *E.E.O.C.*, 304 F. Supp. 33 (E.D. Tenn. 1969) rev'd 428 F.2d 799 (6th Cr. 1970); *Graniteville Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 155 (4th Cir. Feb. 27, 1971); *Adolph Coors Co.* v. *E.E.O.C.*, 3 F.E.P. Cases 62 (D. Colo., Jan. 30, 1971). See also, *Parnessa Realties, Inc.* v. *State Div. of Human Rights*, 317 N.Y.S. 2d 587 (1970).

Beyond this, NOW attempted to charge The Pittsburgh Press with aiding and abetting the perpetration of an unlawful employment practice. Nowhere in the complaint, however, is a specific unlawful employment practice alleged which was aided or abetted by The Press. It is elementary that one cannot aid or abet the commission of an unlawful act unless another commits the unlawful act. Accordingly, a complaint or charge must first allege with specificity, and not as a conclusion, the unlawful act which was supposedly aided or abetted. 21 Am. Jur. 2d, Criminal Law § 119 (1965); *State* v. *Derosia*, 94 N.H. 228, 50 A.2d 231; *United States* v. *Zerbst*, 111 F. Supp. 807 (E.D.S.C. 1953).

The bare allegation that The Press "allows" employers to place help-wanted advertising in "male" or "female" columns clearly fails to justify elementary principles of fairness and due process, and the Commission's own rules. If we assume for the purposes of this immediate discussion that Section 8(j) is valid in its purported application to newspapers in publishing, under sex designated columns, otherwise nondiscriminatory employement advertising, a complainant must allege and prove four points to impose liability on a newspaper. First, he must allege and prove that an employer covered by the Ordinance placed an employment advertisement under a particular sex designated column heading. Second, he must allege and prove that the mere placement of an otherwise nondiscriminatory employment advertisement under a sex designated column heading renders such advertisement discriminatory. Third, he must allege and prove that the job position advertised was not subject to a bona fide occupational exemption based on sex. Finally, he must

allege and prove that the newspaper accepted and published the advertisement knowing that the advertiser was covered by the Ordinance and knowing that the position had no bona fide occupational exemption based on sex. Without such specific allegation, the complaint must fail.

It should be obvious that the complaint does not meet the fundamental tests of fairness in that it was so vague that The Press was not formally apprised of the offense which it was alleged to have committed. For example, in *Cole* v. *Arkansas*, 333 U.S. 196 (1948), in considering the validity of an Arkansas indictment, this Court examined the principles of procedural due process, an element of which is that one be apprised of the offense he allegedly committed:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused in a criminal proceeding, state or federal." (Emphasis added). *Id.* at 301.

It is the amazing position of the Commission, sustained by the lower courts, that whatever vagueness which may have existed in the complaint was cured by preliminary, informal meetings between The Press and the Commission. It is a fundamental principle that defective pleadings may be cured through leave of court to file a formal amendment or, on appeal, an amendment to conform pleadings to proof may be treated as made if it is such as will cause no injustice to the adverse party. *Simms* v. *Andrews*, 118 F.2d 803

(10th Cir. 1941). However, it is equally well established that:

> "the doctrine of implied amendments to make a complaint correspond with the proof cannot obtain if the proof does not establish a cause of action." 41 Am. Jur. *Pleadings* § 310 (1961)[36]

Notwithstanding the lack of proper amendment of the complaint so that The Press could be apprised of the charge brought against it, the Court below concluded, without any supporting evidence in the record whatsover, that as a result of pre-hearing proceedings and a recess between hearing sessions, "certain things should have been obvious" to The Press. Thus, the Court below indulges in speculation as to what might have been said at the pre-hearing proceedings and might have been learned by The Press during the hiatus in the public hearings. Such speculation cannot become the basis for the amendment of a defective charge, particularly when there is not a scintilla of evidence within the record that the defect was cured.

Even if we were to assume, *arguendo*, that fundamental defects in a complaint can be cured by evidence at the public hearing, it is clear that not one missing element discussed above was supplied by any testimony. Not one witness testified that a specific advertisement was placed by a specific covered employer. Nor did any witness testify that a particular job advertised possessed no bona fide occupational qualification based on sex. Moreover, there was not the slightest hint that any proscribed advertisement was ac-

[36] See also, *Nicholson* v. *Nicholson*, 67 Mont. 517, 216 P. 328, 31 A.L.R. 548 (1923).

cepted by The Press with knowledge that the advertiser was covered by the Ordinance or that the position advertised carried no bona fide occupational qualification. Indeed, not one witness testified that he sought employment from a covered employer and was denied employment solely on the ground of sex. In the present posture of this case, the complaint remains unamended and defective and it does not specify a charge against The Press under the provisions of the Ordinance. As Judge Mencer noted in his dissenting opinion:

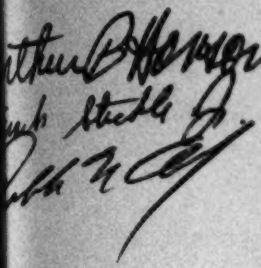
> "The complaint does not allege any violation by anyone else. It is simply impossible for the appellant to be guilty aiding another in the violation of the Ordinance. When no violation was even alleged and in fact, no attempt was made to prove such violation, it is fundamental that one cannot aid that which did not occur. I must conclude that Due Process clearly requires that, without alleging or proving a violation of the Ordinance by an employer who was aided by appellant, the complaint is invalid on its face; and it should be dismissed." (287 A.2d at 176)

### C. CONCLUSION

This case presents to this Court for the first time important questions relating to the extent of First Amendment protection of editorial functions of the press. In the context of the proliferation of legislation directed at making the press the main bulwark in the enforcement of otherwise laudable social legislation, this Court must rule that the exercise of editorial judgment is protected by the First Amendment, regardless of whether that judgment is directed at news presentation or expressions of editorial opinion in the traditional and well-accepted meaning of those terms. For

these reasons and for the reason that the Pittsburgh Press was clearly denied due process by the actions of the courts below and the Commission, this Court should reverse the judgment of the Commonwealth Court of Pennsylvania.

Respectfully submitted,



ARTHUR B. HANSON
W. FRANK STICKLE, JR.
RALPH N. ALBRIGHT, JR.
888 17th Street, N.W.
Washington, D.C. 20006
Telephone: 202-298-6161
*Attorneys for Amicus Curiae, The American Newspaper Publishers Association*